

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES A. ROCK JR.
Claimant

VS.

AFFILIATED FOODS MIDWEST
Respondent

AND

SENTRY CASUALTY CO.
Insurance Carrier

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Docket No. **1,044,653**

ORDER

Respondent and its insurance carrier request review of the June 4, 2009 preliminary hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury on February 21, 2009, arose out of and in the course of employment when claimant lifted a tire and felt a pop in his back while performing his job duties. The ALJ ordered respondent to provide medical treatment with Dr. Alexander Bailey and temporary total disability benefits commencing April 14, 2009.

Respondent requests review of whether claimant's injury arose out of and in the course of employment and whether claimant's condition is causally related to the work injury. Respondent argues claimant has not established a causal connection between his alleged work place injury and his current complaints. Respondent further argues claimant is not entitled to temporary total disability compensation since he was terminated under respondent's zero tolerance policy due to a positive drug test.

Claimant argues the ALJ's Order should be affirmed with regard to claimant's accident arising out of and in the course of employment. Claimant further argues he is entitled to temporary total disability compensation beginning April 4, 2009, due to Dr. Bailey taking him off work from April 4, 2009, for four weeks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

At the time of his deposition, claimant was 41-years-old and had an eleventh grade education. He began working for respondent on October 1, 2008. Claimant's job was to shag trailers in the morning and then work on tractor trailers in the afternoon. He would dismount, mount and repair tires as well as rebuild air dryers. On February 21, 2009, claimant injured his back and described it in the following manner:

A. We was -- every third Saturday we come in and work four hours in the shop. I was repairing a semi tire and I bent down to pick up and I felt something pop in my back. I felt a back pain. I wore a back brace, so I had some Advil and - -

Q. Okay.

A. -- just took it easy.¹

Claimant testified that he currently has numbness in his left leg and buttock. He was terminated by respondent on March 2, 2009, due to failing a drug test. Claimant had prior back surgery and he testified that he continued to have some back pain.

On the day of his accident, claimant did not report his injury due to lack of a supervisor being present. He took it easy the remainder of the day and then went back to work the next day. Claimant worked eight hours and testified his back was sore. The next morning when he got out of bed his back was worse so he contacted work to let them know that he would not be in due to his back problems.

Later that morning when claimant squatted down to check his home fireplace insert, he realized that he couldn't stand up due to excruciating back pain and fell to the floor. Claimant sought treatment at Falls City Community Medical Center's emergency room. X-rays were taken and claimant was prescribed Flexeril and Vicodin. An MRI was also recommended.

The contemporaneous medical record from the emergency room contains a history that claimant experienced severe back pain after moving wood into his fireplace. Claimant denied that he moved any wood and testified that he was bending down to look into his fireplace to see if it needed additional wood when he experienced the severe onset of back pain which left him unable to get up.

¹ P.H. Trans. at 13-14.

Claimant completed an accident report on February 26, 2009, and then was referred to OHS Compcare. Physical therapy was recommended for two weeks. OHS referred claimant to Dr. Alexander Bailey who took claimant off work for four weeks as of April 4, 2009.

Mr. Dean Partridge, respondent's transportation manager, testified:

Q. Okay. You were in the meeting on February 26th when Mr. Rock came in to fill out an accident report and be sent to OHS.

A. Yes.

Q. At that time did you ask him why he didn't tell you that he was injured from the work injury on February 23rd when you spoke to him?

A. Yes.

Q. What did he say?

A. I believe either I or Bill did, I'm not sure. One of us did.

Q. Do you recall what his response was?

A. He didn't think it was that big a deal at that time, that he had had back pain before.²

Respondent argues that claimant suffered an injury to his back while putting firewood in the fireplace at home and that he failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

The claimant testified that he injured his back lifting a tire at work. He further testified that his back frequently bothered him and he did not think it was anything out of the ordinary. But after working the next day his back pain worsened so claimant called respondent and indicated that because of his back pain he would not come in to work. Again he did not report a work-related injury because he thought with time off his back pain would improve. He then testified that when he bent down to check the wood in his fireplace at home he experienced debilitating back pain which led to a trip to the emergency room. Claimant further testified that he was not putting wood in the fireplace.

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In approving claimant's

² P.H. Trans. at 84-85.

request for medical treatment and temporary total disability benefits, the ALJ apparently believed the claimant's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because she was able to personally observe the demeanor of the witnesses. Moreover, the fact that claimant called respondent to advise that he would not be in to work due to back pain corroborates his testimony that he was already experiencing problems before the incident at home when he bent down to look in his fireplace. This Board Member finds claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment. Accordingly, the ALJ's Order is affirmed.

Both parties raised issues regarding the ALJ's award of temporary total disability benefits. The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.³ This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.⁴

The issue whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁵

An ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. Therefore, the ALJ did not exceed her jurisdiction. Accordingly, the Board does not have jurisdiction to address this issue at this juncture of the proceedings.

³ K.S.A. 2008 Supp. 44-551.

⁴ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁵ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated June 4, 2009, is affirmed.

IT IS SO ORDERED.

Dated this 28th day of August 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
David P. Mosh, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2008 Supp. 44-555c(k).